No. 86 1726

In The

Supreme Court of the United States

October Term, 1986

GLOBE LIFE INSURANCE COMPANY, RYAN INSURANCE GROUP, INC. and COMBINED INTERNATIONAL CORPORATION,
Petitioners,

vs.

ED MINIAT, INC., SOUTH CHICAGO PACKING COMPANY, RONALD M. MINIAT and EDMUND M. MINIAT, JR.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an insurance company becomes an ERISA "fiduciary," as defined in 29 U.S.C. §1002(21)(A), merely because it sells an insurance policy to an employee benefit plan and, by arms length contract, retains the right to change the amount of the premiums.

INTERESTED PARTIES

The following listed parties have an interest in the outcome of this case:

Globe Life Insurance Company
(Petitioner)

Ryan Insurance Group, Inc. (Petitioner)

Combined International Corporation
(Petitioner)

Ed Miniat, Inc. (Respondent)

South Chicago Packing Co. (Respondent)

Ronald M. Miniat (Respondent)

Edmund M. Miniat, Jr. (Respondent)

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OPINION BELOW

The opinion of the Court of Appeals is officially reported as Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732 (7th Cir. 1986), and is reproduced as Appendix A at pages A-1 through A-18. The September 23, 1985 memorandum opinion of the district court, which is not reported, is reproduced as Appendix B at pages A-19 through A-30.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 5, 1986. (Appendix C; page A-31). A timely petition for rehearing was denied on January 16, 1987. (Appendix D, page A-32). This petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §1001 et seq.

STATEMENT OF THE CASE

Petitioner Globe Life Insurance Company ("Globe")[1] sold respondent Ed Miniat, Inc. (the "Miniat Company")[2] a policy of group term life insurance coverage on the lives of the Miniats. The insurance coverage was

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1/ The other petitioners in the case, Ryan Insurance Group, Inc. ("Ryan") and Combined International Corporation ("Combined International") were named as parties defendant solely by virtue of their relationship to Globe. Ryan is the parent company of Globe and Combined International in turn owns the stock of Ryan.

2/ The other respondents in the case, South Chicago Packing Company ("South Chicago Packing"), Ronald M. Miniat and Edmund M. Miniat, Jr. (collectively the "Miniats") are parties by virtue of their relationship to the Miniat Company. South Chicago Packing is the successor in interest to the Miniat Company and the Miniats are officers and the sole shareholders of the Miniat Company.

provided through the Miniat Company's participation in a "retired lives reserve trust" (the "RLR Trust") sponsored by Globe.

Through its participation in the RLR Trust, the Miniat Company paid premiums, which would be accumulated in the RLR Trust and, upon the retirement of the Miniats, used to provide life insurance coverage under the RLR Trust's master group term life insurance policy (the "RLR Policy").

On or about July 1, 1983, Globe exercised its authority under the RLR Trust to raise the Miniat Company's premiums and to reduce the amount of interest credited to deposits in the RLR Trust. Thereafter, the Miniat Company terminated its participation in the RLR Trust. In returning the Miniat Company's accumulated contributions, Globe deducted "front end load" charges which, under the terms of the RLR Trust, were not

refundable in the event of an early termination.

On November 9, 1984, the Miniat Company and South Chicago Packing filed a complaint against petitioners.3/ Petitioners moved to dismiss the complaint. While that motion was pending, respondents filed an amended complaint adding the Miniats as individual parties plaintiff.

The amended complaint alleged that, in late 1980, the Miniat Company adopted an employee benefit plan under ERISA consisting of a group life insurance (the "Plan"). The Plan provided for the acquisition of life insurance for "eligible employees" that would provide a fully paid policy upon their

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3/ The district court's jurisdiction, although disputed, purported to rest on 29 U.S.C. §1132(e)(1).

retirement.4/ The Plan was funded through the Miniat Company's participation in the RLR Trust.

The amended complaint acknowledged that the RLR Policy explicitly gave Globe the right to reduce the rate of return it was required to pay on account to a scheduled minimum and to increase the annual premium rates to a scheduled maximum. However, it alleged that Globe's subsequent exercise of

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4/ In fact, the only employees who were "eligible" under the Plan were the Miniat brothers. The Miniat Company's decision to adopt an ERISA plan was premised upon Section 79 of the Internal Revenue Code, as in effect at the time, which provided that an employee was not subject to tax on the value of group life insurance provided by his employer after he retired. Thus, the Miniat Company's contributions to the RLR Trust accumulated and earned interest but, by virtue of Section 79, were not taxable. The Company's "ERISA Plan" was, in reality, no more than a mechanism for the Miniat brothers to avail themselves of the tax advantages of Section 79, and had nothing to do with the protection of employee benefits with which ERISA is concerned.

its contractual authority by reducing the amount of interest credited to deposits on account in the RLR Trust, raising the Miniat Company's premiums and deducting expressly nonrefundable front end load charges breached Globe's fiduciary duties under ERISA. The complaint also asserted a variety of pendent state law claims.

Petitioners moved to dismiss the amended complaint pursuant to Fed.R.Civ.P. 12(b)(6). The district court granted the motion because the amended complaint did not allege (1) the existence of a plan separate and apart from the RLR Trust or (2) the existence of an employee welfare benefit plan covered by ERISA, as described in 29 U.S.C. §1003.

On appeal, respondents contended that the pleadings adequately alleged that a plan established by the employer existed separate

from the RLR Trust. In response, petitioners reiterated their argument as to the lack of existence of an ERISA plan, and also argued that the decision of the district court could be affirmed on the alternative ground that Globe's exercise of its contractual right to change the premium rate did not make it a fiduciary under ERISA when that right was the product of arm's length bargaining governed by competition in the marketplace.

The Seventh Circuit reversed the district court's dismissal order and held, among other things, that Globe's ability under the terms of the RLR Policy to set premiums, in and of itself, was sufficient to make Globe a fiduciary of the Plan notwithstanding that Globe's authority to do so resulted from arms length negotiations.

Petitioners filed a timely petition for rehearing which was denied on January 16, 1987.

ARGUMENT

THIS COURT SHOULD ISSUE A WRIT OF CERTIORARI TO REVIEW, AND ULTIMATELY REVERSE, THE DECISION OF THE COURT BELOW WHICH EXTENDS THE SCOPE OF FIDUCIARY STATUS UNDER ERISA FAR BEYOND THE INTENT OF CONGRESS AND INTERFERES WITH PROTECTED STATE REGULATION OF THE INSURANCE INDUSTRY

The extraordinarily broad decision of the Seventh Circuit, extending fiduciary status under ERISA far beyond the intent of Congress, opens the federal courts to insurance disputes historically deferred to the states and creates undue and inconsistent burdens on insurance companies and other businesses which fund benefits for ERISA-covered benefit plans.

The court below held that whenever a benefit plan invests in an instrument that grants the obligor the authority to vary the

rate of return, the obligor automatically becomes an ERISA fiduciary. The breadth of that holding is virtually unlimited. In addition to insurance contracts, the decision would imply, for example, that an investment by a plan in corporate stock makes the issuing corporation an ERISA fiduciary because the board of directors has the discretion to alter the rate of dividends paid. Likewise, interest-bearing instruments commonly grant the obligor considerable discretion over factors which may affect the value of the instrument, including the interest rate paid and the right to call the instrument if there is a decline in prevailing market rates. The exercise of rights such as these clearly affects the value of the plan's investment and, thus, under the Seventh Circuit's reasoning, confers fiduciary status.

This sweeping standard is inconsistent with Congress' express intent. 29 U.S.C. §1002(21)(A) provides that a person is a fiduciary for purposes of ERISA to the extent that he or she exercises discretion over the management of plan assets, renders investment advice for a fee or exercises discretionary control over the administration of a plan. In the case at bar, these functions were performed by the Miniat Company rather than by Globe. The Seventh Circuit converted Globe's explicit contractual right to modify the interest rate and premiums into an "exercise of discretion over the management of plan assets." This is a perversion of the statutory language, and engrafts new remedies upon ERISA in contravention of the congressional intent and this Court's

decision in Mass. Mutual Life Insurance Co. v. Russell, 473 U.S. 174 (1986).5/

The Seventh Circuit's expansive definition of the term "fiduciary" is also inconsistent with the nature of the obligations imposed upon fiduciaries by ERISA. A fiduciary's first duty is that of undivided loyalty to plan participants. A fiduciary must "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and...for the exclusive purpose of...providing benefits to participants and

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5/ Most courts have taken a much narrower view of fiduciary status under ERISA. See, e.g., Sommers Drug Stores v. Corrigan Enterprises, Inc., 793 F.2d 1456 (5th Cir. 1986); Munoz v. Prudential Insurance Company of America, 633 F.Supp. 564 (D.Colo. 1986); Foltz v. U.S. News & World Report Inc., 627 F.Supp. 1143 (D.D.C. 1986); Richardson v. U.S. New & World Report, Inc., 623 F.Supp. 350 (D.D.C. 1985).

beneficiaries..." 29 U.S.C. §1104(a). A fiduciary is prohibited from "deal[ing] with the assets of the plan in his own interest or for his own account." 29 U.S.C. §1106(b)(1). The fiduciary provisions of ERISA were designed to prevent a fiduciary "'from being put into a position where he has dual loyalties, and, therefore, he cannot act exclusively for the benefit of a plan's participants and beneficiaries.'" National Labor Relations Board v. Amax Coal Co., 453 U.S. 322, 334 (1981) (quoting H.R. Conf.Rep. No. 1280, 93d Cong., 2d Sess. 309, reprinted in 1974 U.S. Code Cong. & Ad News 4639, 5038, 5089).6/

In this context, Globe could never be a fiduciary. When a party, such as an

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6/ See also United Independent Flight Officers, Inc. v. United Air Lines, Inc. 756 F.2d 1262 (7th Cir. 1985); Levy v. Lewis, 635 F.2d 960 (2d Cir. 1980).

insurance carrier, sells an instrument to a benefit plan under which it retains discretion to take actions which may affect the value of the plan's investment, it is literally impossible for it to comply with the fiduciary duties prescribed by ERISA. In exercising its discretion, the carrier inevitably must be influenced by considerations of its own profitability as well as other factors. The insurance company, in effect, provides a higher rate of return than other available investments and retains the flexibility to modify the rates to retain a suitable profit margin. It is a service provider, not a fiduciary.

When a plan purchases an investment, the value of which may vary, and has the authority to change investments, the plan's protections are the marketplace and laws protecting investors generally, including,

when the investments is in an insurance policy, the state laws regulating the insurance industry. There is no indication that, in enacting ERISA, Congress intended to grant benefit plans extraordinary remedies by including as "fiduciaries" those who provide investment media to fund employer benefit plans.

Other courts that have considered this issue have concluded that an insurer does not become a fiduciary under ERISA merely because it enters into a contract to provide insurance benefits.7/ The opinion below is, to our knowledge, the first decision to hold that an insurance contract's inclusion of provisions giving the insurer discretion to set rates is alone sufficient to confer

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7/ See, e.g., Austin v. General American Life Insurance Co., 498 F.Supp. 844 (N.D.Ala. 1980); Cate v. Blue Cross & Blue Shield of Alabama, 434 F.Supp. 1187 (E.D.Tenn. 1977).

fiduciary status. These provisions are commonplace in insurance contracts; and the Seventh Circuit's decision, therefore, dramatically extends the scope of federal regulation of the insurance industry.

The consequence of that extension is likely to be an unwillingness on the part of a wide category of obligors to permit their instruments to be acquired by employee benefit plans. Ironically, by reducing the menu of investment options available to plans, the decision below will serve to injure the very employee beneficiaries whom ERISA was enacted to protect.

The decision below also represents an unwarranted interference with state regulation of insurance companies. Such regulation is specifically preserved under ERISA. 29 U.S.C. §1144. In holding that the setting of premium rates is within the

scope of ERISA, the Seventh Circuit's decision is contrary to the statute's express language and Congress' intent to preserve state regulation.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review, and ultimately reverse, the decision below.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 85-2846

ED MINIAT, INC.,
SOUTH CHICAGO PACKING COMPANY,
RONALD M. MINIAT and EDMUND M. MINIAT, JR.,

Plaintiffs-Appellants,

v.

GLOBE LIFE INSURANCE GROUP, INC. and
COMBINED INTERNATIONAL CORPORATION,

Defendants-Appellees.

Appeal from the
United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 84 C 9781 -
George N. Leighton, Judge.

ARGUED MAY 15, 1986 -
DECIDED NOVEMBER 5, 1986

Before Bauer, Chief Judge, CUDAHY and RIPPLE, Circuit Judges.

APPENDIX A
A-1

CUDAHY, Circuit Judge. The plaintiffs were participating employers in a Retirement Life Reserve ("RLR") insurance policy issued by the defendants. The plaintiffs allege that the defendants violated their fiduciary duties under ERISA and also make various state claims. The district court dismissed the complaint on the grounds that the plan was not established and maintained by an employer or an employee organization and thus was not an employee welfare benefit plan covered by ERISA. We reverse.

I.

The well-pleaded facts in the complaint, which must be accepted as true when considering a motion to dismiss, see LaSalle National Bank v. County of DuPage, 777 F. 2d 377 (7th Cir. 1985), are as follows. The plaintiffs are Ed Miniat, Inc., an Illinois corporation ("Miniat"); South Chicago Packing Company, the successor in interest to Miniat; and Ronald and Edmund Miniat, Jr., officers and shareholders of Miniat and South Chicago Packing Company (collectively the "Miniats"). Defendants are Globe Life Insurance Company ("Globe"), which issued the RLR policy to Miniat; Ryan Insurance Group, which owns Globe's stock; and Combined International Corporation, which in turn owns Ryan's stock.

In late 1980 Miniat adopted an employee benefit plan consisting of group life insurance (the "Miniat Plan" or the

"Plan").[1/] The Miniat Plan provided for the acquisition of life insurance for eligible employees that would provide a fully paid policy upon the employees' retirement. The funding provision of the plan provided:

> The benefits provided under the Plan are to be funded in their entirety by insurance underwritten by The Globe Life Insurance Company, Executive Life Insurance Company, Guardian Life Insurance Company and Provident Life Insurance Company or any other carrier the Plan Administrator deems acceptable. All of the provisions contained in the policies representing any insurance companies [sic] liabilities are considered part of this Plan. Benefits not payable under such policies shall not otherwise be payable under this Plan.

[1/] See infra note 12.

Plaintiffs' Appendix (hereafter "App.") at 47.

The Miniat Plan was actually funded through Miniat's participation, effective October 1, 1980, in a RLR trust (established to hold premiums) sponsored by Globe.2/

2/ Miniat executed an Adoption Agreement for the Globe Life Reserve Trust, which provided:

> I. PLAN ESTABLISHMENT OR AGREEMENT. The undersigned (the "Participating Employer"), in order to establish or amend its plan of group-term life insurance adopts and agrees to be bound by the provisions of the trust agreement, dated September 1, 1978, between Globe Life Insurance Company as Settlor and Rhode Island Hospital Trust National Bank, as trustee (herein called "Trustee"). The trust thereby established is herein sometimes called "Globe Life Reserve Trust." The Globe Life Reserve Trust, this Adoption Agreement, and any schedules or agreements incorporated in either of them, including the "Selection Schedule" attached hereto, and made a part hereof, are designed to constitute a plan of group-term life insurance as defined in Section 79 of the Internal Revenue Code and relevant regulations.
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> * * *
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> V. NAMED FIDUCIARY. The named

(footnote continued)

Amended Complaint ¶18. Miniat paid premiums which were accumulated in the RLR trust and which were later to be used to purchase the

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(footnote continued from previous page)
fiduciary under the plan is the Participating Employer. The Insurer shall have the authority and responsibility for (i) processing and paying the claims for benefits in accordance with the terms and conditions of the insurance contracts under which such benefits are provided, and (ii) providing written notice of any claim such has been denied and for affording a full and fair review of such claims pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA") Section 503 and the regulations promulgated thereunder. The Participating Employer shall be the plan administrator and shall have the authority and responsibility for all other matters relating to the control and management of the plan.

VII. TAX CONSEQUENCES. It is intended that this plan does qualify as a plan of group term life insurance which will satisfy the requirements of Section 79 of the Internal Revenue Code and the regulations thereunder. However, the undersigned Employer acknowledges that in establishing this plan and purchasing policies hereunder it is relying solely upon the tax advice of its own legal counsel and that neither Globe Life Insurance Company nor any of its representatives or agents are
(footnote continued)

life insurance coverage provided for in the Miniat Plan.

The amended complaint alleges that the RLR policy included clauses that gave Globe the "apparent unilateral right to reduce the rate of return that Globe was to pay on account to Miniat to a scheduled minimum (4% per annum) and to increase significantly the annual premium rates to a scheduled maximum." Amended Complaint ¶21. Plaintiffs allege that about July 1983 Globe "unilaterally and without justification announced a withdrawal from the RLR insurance business and an abandonment of existing policy holders, by reducing the rate of return paid on account from 10% to 7% to 4% per annum by November 1, 1983 and increasing premium rates to the maximum

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responsible for the tax consequences of this plan.

App. at 40.

allowed by the policy." Amended Complaint ¶24. Miniat then terminated its participation in the RLR Trust. Globe allegedly deducted "front end load" charges when returning the company's accumulated contributions, thus retaining as "overhead more than half of the premiums paid by plaintiffs to fund the plan without having ever issued any insurance under the plan."[3/] Amended Complaint ¶35. Plaintiffs allege that Globe's actions were without economic justification and breached Globe's fiduciary duties and obligations under ERISA. Amended Complaint ¶¶34, 36, 37, 49, 50. The complaint also contains state law claims respecting unlawful discrimination in violation of the Illinois Insurance Code, promissory estoppel, breach of contract and unjust enrichment.

3/ Globe retained $106,018.60 of Miniat's premium payments. Amended Complaint ¶35.

The district court granted defendants' motion to dismiss. It found "no evidence of the existence of a plan separate and apart from the RLR trust," District Court Memorandum at 9, and that the RLR trust did not fall within ERISA because the plan was not established and maintained by an employer or an employee organization. District Court Memorandum at 10. The court thus dismissed the allegedly federal claims for lack of subject matter jurisdiction under ERISA and dismissed the state claims for lack of pendent jurisdiction.

On appeal plaintiffs contend that the pleadings adequately allege that the Miniat Plan was separate from the RLR trust and was established by an employer. Defendants argue that the district court's analysis and disposition were correct and further argue that the plaintiffs lack standing and that Globe was not a fiduciary under ERISA.

II.

The defendants argue that the plaintiffs lack standing to bring this claim. ERISA provides that an action may be brought by a "participant, beneficiary, or fiduciary." 29 U.S.C. §1132(a). Further, ERISA provides that "the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary." 29 U.S.C. §1132(e)(1). Defendants argue that the corporate plaintiffs,. who clearly are not participants or beneficiaries, are not fiduciaries and therefore lack standing.

ERISA provides that:

a person[4/] is a fiduciary with respect

4/ A "person" is defined as "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization." 29 U.S.C. §1002(9).

to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105 (c)(1)(B)[5/] of this title.

29 U.S.C. §1002(21)(A) (footnotes added).

[5/] Section 1105(c)(1)(B) refers to persons other than named fiduciaries designated by named fiduciaries "to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan." 29 U.S.C. §1105(c)(1)(B).

Plaintiffs contend that Miniat had discretionary authority over the income or assets of the Miniat Plan by virtue of its ability under Article XIV of the Plan to amend any provision of the Plan. Article XIV provides:

> The Employer may amend or terminate this Plan at any time and will furnish any required notification of amendment or termination to the appropriate regulatory authorities and to Plan participants or beneficiaries.

App. at 53. Presumably the provisions subject to amendment include the funding provisions of Article V, in which the insurers providing benefits under the plan are named, as well as Article I, which designates the administrator and named fiduciary under the plan.

A complaint should not be dismissed for failure to state a claim unless it appears

beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). We think that the allegations in plaintiffs' complaint, considered in connection with the Miniat Plan, show that plaintiffs may well be able to prove that the corporate plaintiffs were fiduciaries and thus had standing to bring this action. Hence the claims of the corporate plaintiffs should not have been dismissed at this stage for lack of standing.

In Leigh v. Engle, 727 F.2d 113, 133 (7th Cir. 1984), we held that an individual and a corporation who had the power to appoint and remove the trust administrators were fiduciaries for that purpose. See ERISA Interpretative Bulletin 75-8, 29 C.F.R. §2509.75-8, D-4 (1985).6/ In the

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6/ Section 2509.75-8, D-4, states:
(footnote continued)

case before us it appears that the corporate plaintiffs, by virtue of their power to amend the plan, had the power to select a new insurance company and a new administrator to administer the plan. Thus, at least for some purposes, they may be fiduciaries and hence have standing to bring this suit.7/ See Great Lakes Steel v.

(footnote continued from previous page)

> Q: In the case of a plan established and maintained by an employer, are members of the board of directors of the employer fiduciaries with respect to the plan?
> A: Members of the board of directors of an employer which maintains an employee benefit plan will be fiduciaries only to the extent that they have responsibility for the functions described in section 3(21)(A) of the Act. For example, the board of directors may be responsible for the selection and retention of plan fiduciaries. In such a case, members of the board of directors exercise "discretionary authority or discretionary control respecting management of such plan" and are, therefore, fiduciaries with respect to the plan . . .

7/ District 65, UAW v. Harper & Row,
(footnote continued)

Deggendorf, 716 F.2d 1101 (6th Cir. 1983) (complaint under ERISA should not be dismissed for lack of standing because employer adequately alleged its status as fiduciary); United States Steel Corp. v. Commonwealth of Pennsylvania Human Relations Commission, 669 F.2d 124, 126 (3d Cir. 1982) (employer may be fiduciary when it has authority to alter terms of plan and authority to administer plan). Further, in

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(footnote continued from previous page) Publishers, 576 F. Supp. 1468, 1477-78 (S.D.N.Y. 1983) does not hold, as defendants assert in their brief (at 27), that an employer cannot be a fiduciary by virtue of its power to amend. District 65 holds that a decision to terminate a pension plan is not subject to ERISA's fiduciary standards. 576 F. Supp. at 1477. That case, however, also considered whether an employer's amendment of a plan breached ERISA's fiduciary standards, thus apparently assuming that an employer may be a fiduciary based on its power to amend a plan. 576 F. Supp. at 1480-81. Further, although a decision to terminate may not be subject to ERISA's fiduciary standards, the manner in which a plan is terminated may be subject to these standards. 576 F.Supp. at 1479-80.

Leigh we held that fiduciaries responsible for selecting and retaining their close business associates as plan administrators had a duty to monitor appropriately the administrators' action. Leigh, 727 F.2d at 135. Similarly, the corporate plaintiffs here may well have some duty to monitor the actions of the plan administrator and the insurance company administering the plan.

Defendants also argue that the individual plaintiffs are not properly before the court and therefore their standing as beneficiaries (which is undisputed) cannot operate to resolve the standing issue. Plaintiffs filed an amended complaint, without leave of court, adding Ronald and Edmund Miniat, as beneficiaries, to the complaint as additional plaintiffs. Although Federal Rule of Civil Procedure 15(a) permits a party to freely amend its

complaint in a timely fashion[8], Federal Rule 21 requires a court order to add or drop parties[9]. Thus, in order to add Ronald and Edmund Miniat as plaintiffs, the plaintiffs should have sought an order of the district court. See La Batt v. Twomey, 513 F.2d 641, 651 n.9 (7th Cir. 1975) ("amended complaint could not, as a matter of course, add new parties"); Annot., 31

8/ Rule 15 provides:

> A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. . . .
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> Fed. R. Civ. Pro. 15(a).

9/ Rule 21 provides:

> Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. . . .
>
> Fed. R. Civ. Pro. 21.

A.L.R. Fed. 752, 754-55 (1977). However, if a plaintiff files an amended complaint adding additional parties without first obtaining leave of the court, the defect may be corrected and does not, in itself, justify dismissal of the action. See Northeast Women's Center v. McMonagle, No. 85-4845 (E.D.Penn. Jan. 23, 1986); United States v. Schine, 20 Fed.R.Serv. 336, 337 (W.D.N.Y. 1954); Orloff v. Hayes, 7 F.R.D. 75, 76 (S.D.N.Y. 1946); 7 C. Wright & A. Miller, Federal Practice & Procedure § 1688 at 344 (1972). We see no reason that this error cannot be corrected on remand. Apparently, the defendants have not been prejudiced by the plaintiffs' failure to follow proper procedures. See La Batt, 513 F.2d at 651 n.9; United States v. Sinclair, 347 F.Supp. 1129, 1136 (D.Del. 1972), appeal dismissed sub nom. United States v. Estate of Pearce, 498 F.2d 847 (3d Cir. 1974),

vacated in part, McLellan v. Missippi Power & Light Co., 545 F.2d 919 (5th Cir. 1977).

III.

Defendants also argue that we should affirm the district court's dismissal of the complaint because Globe was not a fiduciary and liability under all of the ERISA counts is premised on Globe's fiduciary status. Because plaintiffs do not argue that they may bring a claim under ERISA even if Globe is not a fiduciary, we shall assume that dismissal is required if Globe is not a fiduciary. Both parties seem to agree that the question whether Globe is a fiduciary is controlled by this court's decisions in Chicago Board Options Exchange v. Connecticut General Life Insurance Co., 713 F.2d 254 (7th Cir. 1983) and Schulist v. Blue Cross, 717 F.2d 1127 (7th Cir. 1983).

Defendants rely on Schulist to argue that Globe is not a fiduciary because it is

without authority to change the rate of return and the premium rate. In Schulist the plaintiffs had argued that Blue Cross had breached its fiduciary obligation by retaining a premium surplus. The contracts between the parties did not establish that the premium surplus was to be refunded. We held that Blue Cross was not a fiduciary for purposes of the case because it did not exercise discretionary authority with respect to the setting of rates. Blue Cross had entered into an "arm's length bargain presumably governed by competition in the marketplace" that specified the premium rate. Schulist, 717 F.2d at 1132. The defendants therefore argue that under Schulist Globe is not a fiduciary because it entered into an arm's length bargain governed by competition in the marketplace that permitted Globe to change the rate of return and the premium rate. The defendants

in effect argue that no action by an insurer can subject it to fiduciary liability so long as discretion to take the action was granted to it by contract and the contract was entered into at arm's length. This reading of Schulist is incorrect. Rather, Schulist stands for the proposition that if a specific term (not a grant of power to change terms) is bargained for at arm's length, adherence to that term is not a breach of fiduciary duty. No discretion is exercised when an insurer merely adheres to a specific contract term. When a contract, however, grants an insurer discretionary authority, even though the contract itself is the product of an arm's length bargain, the insurer may be a fiduciary.

The case before us is more analogous to Chicago Board. In Chicago Board the insurer amended the contract so that contributions to guaranteed accounts could not be

withdrawn for ten years. The insurer arguably had the right under the contract to effect this type of amendment unilaterally. We held that the insurer was a fiduciary because the policy itself was a plan asset and the ability to amend it, and thereby affect its value, established control over that asset in the insurer. We stated in Chicago Board that the insurer's control was not qualitatively different from the ability to select investments.

> It is clear that Congress intended the definition of fiduciary under ERISA to be broad. . . . Had CBOE simply given Plan assets to Connecticut General and said, "Invest this as you see fit and we will use the proceeds to pay retirement benefits," Connecticut General would clearly have sufficient control over the disposition of Plan assets and be a fiduciary under ERISA.

Peoria Union Stock Yards Co. v. Penn Mutual Life Insurance Co., 698 F.2d 320 (7th Cir. 1983).10/ Because Connecticut General guaranteed the rate of return in advance for the Guaranteed Accounts, that is not the case here. Nevertheless, the policy itself is a Plan asset, and Connecticut General's ability to amend it, and thereby alter its value, is not qualitatively different from the ability to choose investments. By locking CBOE into the Guaranteed Accounts for the next 10 years Connecticut General has effectively determined what type of investment the Plan must make. In exercising this control over an asset

10/ In Peoria, a case that we believe also supports the thesis that Globe may be a fiduciary, we held that an insurance company was an ERISA fiduciary when the assets of the plan were turned over to it to manage with full investment discretion, subject only to a modest income guaranty. 698 F.2d at 327.

> of the Plan, Connecticut General must act in accordance with its fiduciary obligations.

713 F.2d at 260 (emphasis supplied)(footnote added). Similarly, in the case before us, Glove has the power to amend the contract and thereby alter its value. The power exercised by Globe does not appear to be qualitatively different from the ability to choose investments. Therefore we believe that plaintiffs may be able to prove that Globe is a fiduciary.

IV.

The most significant issue here is whether there is an employee benefit plan that would be subject to ERISA. ERISA, of course, generally applies only to employee benefit plans. 29 U.S.C. §1003(a). The district court held that the RLR trust was not an employee benefit plan and that there was no evidence of the existence of a plan

separate and apart from the RLR trust. Plaintiffs assert that the Miniat Plan, not the RLR trust, is an employee welfare benefit plan, one of the two types of employee benefit plans covered by ERISA.11/

ERISA defines an "employee welfare benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness,

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11/ The other type of employee benefit plan covered by ERISA is an employee pension benefit plan, which is defined at 29 U.S.C. §1002(2).

accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

29 U.S.C. §1002(1).

A welfare plan requires five elements: (1) a plan, fund or program, (2) established or maintained, (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship or other training programs, day care centers, scholarship funds, prepaid legal services or severance

benefits, (5) to participants or their beneficiaries. See Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982).

The district court's conclusion that there was no "evidence" of a plan separate and apart from the RLR trust is wide of the mark. At this stage in the proceedings the district court may consider only the sufficiency of the allegations - not the sufficiency of the evidence. The Miniat Plan is distinct from the RLR trust, even though the Miniat Plan funds the benefits that it provides by the mechanism of the RLR trust[12/]. Further, the documents before us

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12/ Plaintiffs apparently failed to attach a copy of the Miniat Plan to their amended complaint. Consequently the Plan did not become part of the pleadings pursuant to Federal Rule of Civil Procedure 10(c), which provides that a "copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." We will, however, on the special facts of this case, consider to Miniat Plan in reviewing the grant of the motion to dismiss. See Bechtel Corp. v. Local

(footnote continued)

indicate that the plaintiffs may be able to prove that the Miniat Plan has been established - that is, the decision to extend benefits has become a reality.13/

(footnote continued from previous page)
215, Laborers' Int'l Union, 405 F. Supp. 370, 374 n.1 (M.D.Penn. 1975) (agreement considered on motion to dismiss although not attached to complaint when it is referred to in the complaint, is attached to motion to dismiss and its authenticity is admitted by defendants), aff'd in part, 544 F.2d 1209 (3d Cir. 1976). But see Monroe v. Board of Educ., 65 F.R.D. 641 (D. Conn. 1975) (documents attached to defendants' brief in opposition to the plaintiffs' motion for partial summary judgment, but not attached to the complaint, are not made part of the pleadings under Rule 10(c)). First, defendants concede that plaintiffs referred to the existence of the Miniat Plan in their Amended Complaint. See Defendants' Brief at 7 n.4. Second, defendants attached a copy of the Plan to their Motion to Dismiss and plaintiffs obviously concede its authenticity because they include it in their appendix on appeal and rely extensively upon it in their brief. Third, defendants are apparently content to have us consider this document. See Defendants' Brief at 7 n.4.

13/ The district court may certainly
(footnote continued)

See Donovan, 688 F.2d at 1373. The plaintiffs may well be able to show that a reasonable person "could ascertain the intended benefits, beneficiaries, source of financing and procedures for receiving benefits" from the surrounding circumstances. Id. The Plan may adopt some of its essential provisions from sources outside itself, e.g., from the insurance policies that provide the Plan's funding. Id. Hence the fact that the Miniat Plan incorporates the provisions of the Globe policies, see Miniat Plan §V, does not mean that a separate plan has not been established.

Defendants do not dispute that the Plan was established for the proper purposes. Rather, their contention is that the Miniat

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(footnote continued from previous page)
consider the sequence of the adoption of the Miniat Plan and the purchase of the RLR coverage in considering, in further proceedings, whether a plan was established.

Plan was not established by an employer within the meaning of ERISA because the Plan does not cover workers in the "traditional employer-employee relationship." Defendants' Brief at 15.

The regulations under ERISA provide:

> (c) Employees. For purposes of this section:
>
> 1) an individual and his or her spouse shall not be deemed to be employees with respect to a trade or business, whether incorporated or unincorporated,which is wholly owned by the individual or by the individual and his or her spouse . . . .

29 C.F.R. §2510.3-3. The Miniat Plan is not diminished or vitiated by this regulation because the beneficiaries here are not excluded from employee status by the regulation. Defendants argue, however, that "[w]hen a case falls outside of this per se

rule, it is necessary to consider whether the alleged 'plan' involves anything more than the use by shareholders of their corporation to acquire their personal insurance coverage on a tax-favored basis." Defendants' Brief at 18. Defendants rely for this argument on Taggart Corp. v. Life & Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981), and Donovan v. Dillingham, 688 F.2d 1367 (11th Cir. 1982).

Taggart held that a multiple employer trust that provides group insurance to employers too small to qualify for group rates of their own and which was operated by independent entrepreneurs for profit was not a "plan" within the scope of ERISA. Nor was an employer's subscription to the trust held to establish a "plan." 617 F.2d at 1211. The court emphasized that the alleged plan had no assets and was liable for no benefits

and that the "corporation did no more than make payments to a purveyor of insurance, patently for tax reasons." 617 F.2d at 1211.

> Considering the history, structure and purposes of ERISA, we cannot believe that that Act regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.

617 F.2d at 1211.

In Donovan, on the other hand, the court held that certain employers or unions that subscribed to a multiple employer trust to furnish health insurance for employees or members had established employee welfare benefit plans. One set of subscribers had furnished insurance pursuant to an agreement to furnish such insurance or pursuant to a

continuing practice of purchasing insurance for a class of employees. Another set of subscribers had not previously furnished health insurance to their employees or members, and did not subscribe to the trust pursuant to an agreement to furnish such health benefits to their employees. Instead, this group of subscribers had purchased benefits for a substantial percentage of a class of employees or members under circumstances tending to show an anticipation that these benefits would continue to be furnished. 688 F.2d at 1374-75. The Donovan court rejected Taggart to the extent that that case implied "that an employer or employee organization that only purchases a group health insurance policy or subscribes to a [multiple employer plan] to provide health insurance to its employees or members cannot be said to have

established or maintained an employee welfare benefit plan." 688 F.2d at 1375.

Therefore, we see no reason to read into the seemingly clear language of the statute the additional requirement urged by the defendants. Neither the regulation nor the cases require such an intrusion into Congress' domain. The regulation (29 C.F.R. §2510.3-3) simply does not apply to the case before us. And, contrary to defendants' assertion, Donovan does not hold that if the only employer activity is the purchase of insurance, an employee benefit plan results only if a substantial percentage of a class of employees are beneficiaries.14/

14/ Defendants assert that Donovan held that "in order for an 'employee benefit plan' to be one within the coverage of ERISA, it must provide benefits for employees 'because of their employee status in an employment relationship.'" Defendants' Brief at 13. Donovan merely stated that:

> The gist of ERISA's definitions of employer, employee organization, participant, and beneficiary is

(footnote continued)

Defendants' Brief at 16. The court in Donovan said that employers that subscribed to a multiple employer trust pursuant to an agreement to purchase insurance for a class of employees established employee welfare benefit plans - without need for an examination of the number of employees that

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(footnote continued from previous page)
that a plan, fund, or program falls within the ambit of ERISA only if the plan, fund, or program covers ERISA participants because of their employee status in an employment relationship, and an employer or employee organization is the person that establishes or maintains the plan, fund, or program. Thus, plans, funds, or programs under which no union members, employees or former employees participate are not employee welfare benefit plans under Title I of ERISA. See 29 C.F.R. 2510 3-3(b), (c).

688 F.2d at 1371. Ronald and Edmund Miniat are deemed to be employees under ERISA and under the regulations for the purpose of determining whether employees are participants in the Plan. The language quoted by the defendants is a summary of the statutory requirements, which the plaintiffs meet, not an addendum to, or gloss upon, those requirements.

were furnished with such benefits. 688 F.2d at 1374. The Donovan court merely went on to say that "subscribers that previously had not furnished health insurance to their employees or members, and that did not subscribe to [an insurance trust] pursuant to an agreement to furnish health benefits, [but] nevertheless did purchase benefits for a substantial percentage of a class of employees or members under circumstances tending to show an anticipated continuing furnishing of such benefits" also established employee welfare benefit plans. 688 F.2d at 1374-75 (emphasis supplied). Nor do we read Taggart and Donovan as proclaiming some principle to the effect that "the use by shareholders of their corporation as a conduit to obtain insurance coverage for tax reasons is not the establishment of an employee benefit plan." Defendants' Brief at 16. At most the cases

suggest that, when the sole employee of a corporation, for that employee's own benefit or for that of his or her family, subscribes to a trust, the necessary intent on the part of the corporation to provide benefits for its employees may be lacking. Thus, although Donovan and Taggart are not controlling here, they do support the defendants' broader contention that we should examine the corporation's intent. In the case before us the corporation has, via a written agreement, established its intent potentially to provide benefits to all salaried employees. This is not a case, like Taggart, in which a corporation arguably failed to express the necessary intent. Thus, we do not believe that Taggart and Donovan require dismissal of the complaint.

We express no opinion whether a plan established merely as a "tax scheme" may be

protected under ERISA. But even if we were to assume the "tax scheme" was outside ERISA as suggested by defendants, it is certainly unclear at this point that the Miniat Plan was merely a tax scheme for the benefit of shareholders and not a plan for the benefit of employees. The Plan provided post-retirement benefits for salaried employees with fifteen or more years of service. Although defendants argue that only the two shareholders were eligible under these criteria - an assertion that is not clearly supported by the record[15/] - presumably other employees would receive benefits once

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15/ Although defendants assert that Ronald and Edmund Miniat were the only employees who qualified for post-retirement benefits, see Defendants' Brief at 11, 14, the amended complaint merely states that the "agreement provided eligible employees of Miniat (initially Ronald and Edmund) with post-retirement death benefit coverage." Amended Complaint ¶18. We find nothing in the record establishing that Ronald and Edmund are currently the only eligible employees.

they had accumulated enough years of service.16/ The possibility of other employees receiving benefits in the future certainly is relevant to determining whether a plan is merely a tax scheme.

For the reasons stated above, we reverse the dismissal of the amended

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16/ Defendants argue that we should not consider whether non-shareholder employees could in the future become eligible to participate because, under the regulations, in the future an employee is not considered a participant for purposes of determining whether a plan is covered by ERISA until the employee is eligible to receive a benefit. See 29 C.F.R. §2510.3-3(d)(i)(1). While this regulation precludes us from considering as employees only those that are merely potentially eligible in determining whether a plan is established for the purpose of providing benefits for "its participants or their beneficiaries," this regulation does not preclude us from considering such persons as employees when considering whether an alleged plan is merely a tax scheme. Because Ronald and Edmund Miniat are participants, there is no question in the case before us that the plan was established for the purpose of providing benefits to its participants.

complaint and remand for further proceedings not inconsistent with this opinion. Circuit Rule 18 shall apply.

A true Copy:

Teste:

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Clerk of the United States Court
of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

GEORGE N. LEIGHTON
84 C 9780, 84 C 9781
September 23, 1985

Sebastian et. al. v. Globe Life
Insurance Co., et al., 84 C 9780

Miniat et al. v. Globe Life
Insurance Co., et al., 84 C 9781

Judgment is entered as follows:

For the reasons stated in the attached memorandum, defendants' motions to dismiss are granted. Case No. 84 C 9780 and 84 C 9781 are dismissed in their entirety.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SEBASTIAN ASSOCIATES, INCORPORATED AND JOHN E. SEBASTIAN	)	
Plaintiffs,	)	
v.	)	No. 84 C 9780
GLOBE LIFE INSURANCE COMPANY, RYAN INSURANCE GROUP, INC. AND COMBINED INTERNATIONAL CORPORATION	)	Before the Honorable George N. Leighton U.S. District Judge
Defendants.	)	

and

ED MINIAT INC., SOUTH CHICAGO PACKING COMPANY, RONALD M. MINIAT AND EDMUND M. MINIAT, JR.,	)	
Plaintiffs,	)	
v.	)	Related Case No. 84 C 9781
GLOBE LIFE INSURANCE COMPANY, RYAN INSURANCE GROUP, INC. AND COMBINED INTERNATIONAL CORPORATION	)	
Defendants.	)	

Memorandum

These are defendant's motions to dismiss the amended complaints in two related cases, Sebastian, et. al. v. Globe Life Insurance Co., et. al., 84 C 9780, and Miniat, et. al. v. Globe Life Insurance Co., et. al., 84 C 9781. Plaintiffs in Case No. 84 C 9780 are Sebastian Associates, Inc., ("SAI") and John E. Sebastian. SAI, through its chief executive officer, John E. Sebastian, was the master general agent for Globe Life Insurance Company ("Globe") in connection with the issuance of its Retirement Life Reserve ("RLR") policies. Plaintiffs in Case No. 84 C 9781 are Ed Miniat, an Illinois corporation ("Miniat"), Ronald and Edmund Miniat, officers and shareholders of Miniat, and South Chicago Packing Company, its successor in interest. They were participating employers in a Retirement Life Reserve ("RLR") insurance

policy issued by defendants. Defendants in both 84 C 9780 and 84 C 9781 are Globe Life Insurance Company ("Globe"), Ryan Insurance Group, which owns Globe's stock, and Combined International Corporation, which in turn owns Ryan's stock. Both 84 C 9781 and 84 C 9780 arise out of the same series of transactions.

Case No. 84 C 9780

Plaintiffs had selected defendants to provide RLR insurance benefits to SAI's customers and became the master general agent ("MGA") for defendants. They contend defendants misrepresented that the RLR policies would be administered in accordance with then-existing industry standards and that defendants would remain in the RLR business and fully service the policies sold by plaintiffs. Globe later decided to withdraw from the RLR market. Plaintiffs

allege defendants breached the MGA contract by discriminating in favor of certain policyholders, not remaining competitive, and failing to provide home office support. As a result of these actions, plaintiffs terminated the MGA contract which they allege resulted in lost income. They invoke the jurisdiction of this court under 29 U.S.C. §1331 alleging violations of ERISA, 29 U.S.C. §1001 et. seq. Plaintiffs claim they were fiduciaries as defined under ERISA §1002(21) because they rendered investment advice for a fee and their clients were participating employers and employees under §1132(a)(2) and (3). Plaintiffs contend defendants breached certain fiduciary duties under §§1104 and 1106. They also allege pendent state law claims for breach of contract, misrepresentation, promissory estoppel, and interference with prospective advantage.

In their motion to dismiss, defendants contend that under §1132(a)(2) plaintiffs do not have standing to sue. They insist that a person is deemed a fiduciary under ERISA only when discretionary control or investment advice is exercised on a regular basis, and that plaintiffs exercised no such control. Alternatively, defendants argue that even if plaintiffs are considered fiduciaries, they have failed to allege a cause of action under ERISA because they are not suing on behalf of a party protected by ERISA. Plaintiffs argue that insurance brokers can be plan fiduciaries; and that they have standing to sue as a party within ERISA's "zone of interest". Plaintiffs also contend that a fiduciary can sue for damages on his own behalf.

Plaintiffs initially claim they are fiduciaries of a plan as defined in the Act. Under ERISA, a person is deemed a fiduciary

(and thus entitled to bring an action) where discretionary control or investment advice are rendered in relation to the plan on a regular basis. 29 U.S.C. §1002(21)(A). When no facts are alleged that show that the party in question exercised any discretionary control over either the investment or administration of the fund, that party cannot be deemed a fiduciary under ERISA. Thorton v. Evans, 692 F.2d 1064, 1077 (7th Cir. 1982).

The court finds that no such facts have been alleged in the case at bar. Conclusory allegations unsupported by any factual assertions cannot withstand a motion to dismiss. Briscoe v. LaHue, 663 F.2d 713, 723 (7th Cir. 1981), cert. denied sub nom., Talley v. Crosson, 460 U.S. 1037 (1983). Plaintiffs' conclusory allegation that they rendered investment advice for a fee fails to allege any facts demonstrating that they

engaged in activities that would make them fiduciaries with respect to a plan. Accordingly, the court concludes that plaintiffs have failed to allege sufficient facts demonstrating their fiduciary status in order to bring suit under §1132(a).

However, plaintiffs assert that even if they are not deemed fiduciaries under the Act, insurance brokers have standing to sue under ERISA because they fall within ERISA's "zone of interest" as defined by the Ninth Circuit in Fentron Industries Inc. v. National Shopmen Pension Fund, 674 F.2d 1300, 1304-05 (9th Cir. 1982). This circuit, however, has not followed this broad interpretation and has limited ERISA jurisdiction as to parties plaintiff to participants, beneficiaries, and fiduciaries under §1132(a). See National Metalcrafters v. McNeil, 602 F. Supp. 233, 237 (N.D. Ill. 1985); Amalgamated Industrial Union Local

44-A v. Webb, 562 F. Supp. 185, 188 (N.D. Ill, 1983).

Further support for this more limited reading of ERISA provisions is provided by the recent Supreme Court decision in Massachusetts Mutual Life Ins. Co. v. Russell, 53 U.S.L.W. 4938, 4940 (June 25, 1985), which cautions against constructing entirely new classes of relief under ERISA and making them available to entities other than a plan. Accordingly, the court concludes that plaintiffs are not participants, beneficiaries or fiduciaries and therefore do not have standing to sue under ERISA. A failure to show standing requires dismissal under Rule 12(b). School Crossing Guards Ass'n v. Beame, 438 F. Supp. 1275, 1280 (S.D.N.Y. 1977). Count VI based on ERISA therefore must be dismissed. Counts I-V, pendent state law claims, must also be dismissed, as plaintiffs have no

independent basis for federal jurisdiction. Accordingly, defendants' motion to dismiss is granted; this suit is dismissed in its entirety.

Case No. 84 C 9781

In 1980, Globe issued an RLR policy to Globe Life Reserve Trust, naming a Rhode Island Bank as trustee. The RLR policy provided for post-retirement death benefits for employees of Miniat. The only participants in the RLR coverage were Ronald and Edmund Miniat, shareholders and officers of Miniat. Plaintiffs contend that defendants, through SAI, misrepresented that the RLR policies would be administered in accordance with then-existing industry standards and that defendants would remain in the RLR business and fully service plaintiffs' policy. When defendants changed the rate of return and annual premium rates,

plaintiffs cancelled the policy. Plaintiffs brought suit and invoke the jurisdiction of this court under 29 U.S.C. §1331 alleging violations of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1001 et. seq. Plaintiffs contend, inter alia, that defendants breached their fiduciary duties under ERISA by failing to act in the best interests of beneficiaries. Plaintiffs also allege four pendent state law claims for discrimination, promissory estoppel, breach of contract, and recission.

In their motion to dismiss, defendants contend that RLR coverage does not constitute an employee benefit plan subject to ERISA and that even if it did, plaintiffs do not have standing to sue. Plaintiffs contend that the RLR trust is an employee benefit plan subject to ERISA and that they have standing as fiduciaries and beneficiaries.

In order for this court to have subject matter jurisdiction in this case, the suit must involve an employee benefit plan subject to ERISA. National Metalcrafters v. McNeil, 602 F. Supp. 232, 235 (N.D. Ill. 1985). The threshold issue in this case is whether the RLR trust is an employee benefit plan under ERISA. In their response to defendants' motion to dismiss, plaintiffs claim that they are not alleging that the RLR trust itself was an employee benefit plan, but rather that they established their own plan separate from the RLR trust and that this plan is subject to ERISA.

Under ERISA, 29 U.S.C. §1002(1), a welfare plan requires (1) a plan, fund, or program (2) established or maintained (3) by an employer or an employee organization (4) for the purpose of providing benefits (5) to participants and their beneficiaries. Donovan v. Dillingham, 688 F.2d 1367, 1373

(11th Cir. 1982) (en banc). The purchase of insurance alone does not conclusively establish the existence of a plan. Id. The issue in this case is whether the second and third factors have been met. In order to be considered a plan covered by ERISA, an employer or an employee organization and not an insurer, must establish and maintain the plan. Donovan, supra at 1373. Plaintiffs concede that the RLR trust was created and maintained by defendant insurers, but claim they established a plan separate from this which they themselves maintained.

The court finds no evidence of the existence of a plan separate and apart from the RLR trust. Thus, the court finds that Taggart Corp. v. Life & Health Benefits Admin., 617 F.2d 1208 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) is analogous to the case at bar. In Taggart, a multiple employers trust (MET) provided group

insurance to employers too small to qualify for group rates on their own. Taggart corporation subscribed to the MET to provide benefits for its sole employee. The court found that the venture was maintained by the insurer and was therefore not "established or maintained by the appropriate parties to confer ERISA jurisdiction." Id. at 1210 (citations omitted). The court went on to declare that the corporation's subscription did not establish a single employer welfare plan stating, "we cannot believe that the Act (ERISA) regulates bare purchases of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers, or assumes responsibility for the policy or its benefits". Id. at 1211.

This reasoning applies with equal force to the case at bar. The RLR trust was established and maintained by defendant

insurers. It was funded by master life insurance contracts owned by defendants. The trustee, Rhode Island Trust, had exclusive power to exercise all rights and options under the contracts except those set forth in individual certificates. Here, as in Taggart, the employer owned no assets of the plan and was liable for no benefits. The only two eligible employees in the plan were Ronald and Edmund Miniat. The duties involved in the management of the plan were vested in the plan administrator and named fiduciary or the monitoring committee. Although these parties were officers of Miniat, the administration nonetheless was separate from the employer corporation. The court therefore finds that the RLR trust does not fall within ERISA because the plan was not established and maintained by an employer or an employee organization. Thus, the RLR trust does not constitute a welfare

plan covered by ERISA within the meaning of 29 U.S.C. §1002(1). Plaintiffs therefore have no right of action under 29 U.S.C. §1132. Accordingly, counts I, II, and III alleging ERISA violations are dismissed. Counts IV, V, VI, VII, pendent state law claims, must also be dismissed as plaintiffs have no independent basis for federal jurisdiction. Buikema v. Hay[illegible] 562 F. Supp. 910, 911 (N.D. Ill. 1983). Accordingly, defendants' motion to dismiss is granted; this suit is dismissed in its entirety.

So ordered,

/s/
George N. Leighton
United States District Judge

DATED: September 23, 1985

JUDGMENT - ORAL ARGUMENT

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

November 5, 1986

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge

ED MINIAT, INC., SOUTH CHICAGO PACKING COMPANY, RONALD M. MINIAT and EDMUND M. MINIAT, JR.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	)	
No. 85-2846	)	
vs.	)	
GLOBE LIFE INSURANCE GROUP, INC. and COMBINED INTERNATIONAL CORPORATION,	)	No. 84-C-9781 GEORGE N. LEIGHTON, Judge
Defendants-Appellees.	)	

This cause was heard on the record from the United States District Court for the

Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case is REMANDED, in accordance with the opinion of this court filed this, date.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

January 16, 1987

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge

ED MINIAT, INC., SOUTH CHICAGO PACKING COMPANY, RONALD M. MINIAT and EDMUND M. MINIAT, JR.,	)	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Plaintiffs-Appellants,	)	
No. 85-2846	)	
v.	)	
GLOBE LIFE INSURANCE GROUP, INC. and COMBINED INTERNATIONAL CORPORATION,	)	No. 84-C-9781 GEORGE N. LEIGHTON, Judge
Defendants-Appellees.	)	

O R D E R

On consideration of the petition for rehearing filed in the above-entitled cause by defendants-appellees, all of the judges

on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

The pertinent sections of ERISA, 29 U.S.C. §1001 et seq., provide:

29 U.S.C. §1002 (21)(A).

Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

29 U.S.C. §1104 Fiduciary Duties.

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying

employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)-

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. §1106 Prohibited Transactions.

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect-

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not-

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be

treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

29 U.S.C. §1144 Other Laws.

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 1003(a) of this title, which is not exempt under section 1003(b) of this title (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies,

insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 1136 of this title.

(4) Subsection (a) of this section shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) of this Section shall not apply to the Hawaii Prepaid Health Care Act (Haw.Rev.Stat. §§393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) of this section-

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after January 14, 1983), but the Secretary may enter into cooperative arrangements under this paragraph and section 1136 of this title with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section-

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides-

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this subchapter, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this subchapter.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 1002(1) and section 1003 of this title

necessary to be considered an employee welfare benefit plan to which this subchapter applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this subchapter apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program participating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by

an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

(c) Definitions

For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of

employee benefit plans covered by this subchapter.

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.

No. 86-1726

In The
Supreme Court of the United States
October Term, 1986

GLOBE LIFE INSURANCE COMPANY, RYAN INSURANCE GROUP, INC. and COMBINED INTERNATIONAL CORPORATION,
Petitioners,

vs.

ED MINIAT, INC., SOUTH CHICAGO PACKING COMPANY, RONALD M. MINIAT and EDMUND M. MINIAT, JR.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit erred in determining that the district court misapplied the legal standard of review for a motion to dismiss.

COUNTERSTATEMENT OF THE CASE

This suit was filed by plaintiff individuals and corporations[1] complaining that their employee welfare benefit plan was wrongfully terminated by the defendants in violation of the Employee Retirement Income Security Act (ERISA). Alleging federal jurisdiction under ERISA, plaintiffs sued the defendant insurance companies. Plaintiffs' essential claim is twofold: (1) the defendants, Globe Life Insurance Co. and Ryan Insurance Group, Inc., entered the Retired Lives Reserve insurance market, implied and represented to the public and to plaintiffs that they would provide reserve life policies and administer such policies in conformity with current industry standards, and would conduct this type of business and service the policies on a long term basis to present and future qualified employees; and (2) once plaintiffs had purchased defendants' product, defendants terminated the policies, kept a preponderance of the premiums and left the market before additional employees became eligible for participation in the retirement plan.

Defendants sought dismissal on the grounds that plaintiffs had failed to state a claim. In particular, they asserted that plaintiffs' complaint was deficient in alleging an employee benefit plan. The district court granted defendants' motion to dismiss.

On-appeal to the Court of Appeals for the Seventh Circuit, the court ruled that the district court misapplied the legal standard for determining adequacy of the amended complaint because it failed to consider the allegations of the complaint as true. The court further determined that the amended complaint adequately alleged that corporate plaintiffs had standing to bring the suit

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[1] Respondents that are corporations are Ed Miniat, Inc. an Illinois corporation and South Chicago Packing Co., which is successor-in-interest to Ed Miniat, Inc.

as fiduciaries under ERISA, that individual plaintiffs had ERISA standing as plan beneficiaries, and that Globe was an ERISA fiduciary. The court of appeals reversed the district court's dismissal of plaintiffs' amended complaint and remanded the case for further proceedings. Defendants' petition for rehearing was denied by the court of appeals. Thereafter, defendants filed their petition for certiorari with this court.

This brief in opposition to the petition for a writ of certiorari is filed on behalf of respondents.

SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied because no reasons supporting a grant of discretionary review are present in this case.

ARGUMENT

1. This case is not ripe for review.

Review at this time is inappropriate because the factual record for determining whether the defendant insurance companies were fiduciaries has not been developed in the trial court. Defendants have not answered the complaint and no discovery has taken place. Citing no legislative history, petitioners claim that their performance of the function of plan administration is insufficient to deem them fiduciaries. In effect, petitioners are seeking a ruling by this Court that an insurance company cannot be deemed a fiduciary under ERISA regardless of the facts alleged. Such a ruling would run counter to the broad remedial scope of ERISA.

2. Cases relied on by petitioners are inapposite.

Petitioners claim that the decision below is inconsistent with *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). In *Russell*, the Court held that no private right of action accrued to a plan participant or beneficiary for extra-contractual compensatory or punitive damages caused by improper or untimely processing of claims benefits by a fiduciary. In the instant case, the corporate plan administrator and participants are seeking enforcement of fiduciary obligations of the plan fiduciary. The types of claims being asserted against the fiduciary are claims based on express statutory remedies of ERISA and are not private implied rights.

Likewise, this Court's decision in *National Labor Relations Board* v. *Amax Co.*, 453 U.S. 322 (1980) is inapposite. There, the issue before the Court was whether a

trustee of a trust fund created under the National Labor Relations Act is a representative for purposes of that Act. In the instant case, there is no labor law issue nor any other matters remotely connected with matters at issue in *Amax*.

3. There is no conflict among the circuit courts.

The Seventh Circuit's decision comports fully with a recent decision by the Court of Appeals for the Ninth Circuit. In *Credit Managers Association* v. *Kennesaw Life and Accident Insurance Co.*, 809 F.2d 617 (9th Cir. 1987), the district court had granted summary judgment on the grounds, *inter alia*, that an insurer issuing insurance coverage to medical benefit trusts was not an ERISA plan fiduciary. The circuit court reversed, holding that the record available to the district court contained enough evidence of the insurer's discretionary authority over administration of the plan assets to survive a motion for summary judgment. There, as here, the circuit court properly required the development of a full record in the trial court before entering a ruling on the issue of fiduciary status.

CONCLUSION

For all the foregoing reasons, we respectfully request the Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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